AD-A116 870 RAND CORP SANTA MONICA CA F/G 5/11
A TAXONOMY FOR PRIVACY,(U)
NOV 81 W H WARE
UNCLASSIFIED RAND/P-6708 NL

END
DATE FILMED
8-82
DTIC

A TAXONOMY FOR PRIVACY

Willis H. Ware

November 1981

P-6708

A TAXONOMY FOR PRIVACY*

The invitation to present this paper suggested that it might seek to organize privacy concerns in some overall framework. How can the many dimensions of privacy be all put together? How can the various perspectives on privacy be harmonized? Can a focus be provided to give some guidance to the legal and judicial systems of the country? Behind these questions is the observation that the legal, judicial, and legislative communities -- as influenced by moral and ethical views -- are dealing with privacy issues one by one as they arise. So to speak, the issues are dealt with disjointly and in the small rather than in the large. There seems to be no cohesion presently across the fabric of privacy.

A suitable framework must not only accommodate the forward march of technology, but it also must embrace such privacy law as has already been created; and it must provide a mechanism for the moral and ethical views of society to play their part. One might try to approach the task by imagining the privacy consequences for each new application of new technologies. However, one cannot be sure that a comprehensive catalog would ensue; and anyway it would all be speculation about things that are possible in principle but might never happen. It is altogether too easy to construct scenarios based on technological possibilities, but altogether too difficult to predict whether such events will ever occur.

*Presented at the National Symposium on Personal Privacy and Information Technology, sponsored by the American Bar Association and AFIPS, at Amelia Island Plantation, Florida, October 4-7, 1981.

The discussion here will attempt a pragmatic look at the broad sweep of privacy and is oriented toward providing the legal and judicial communities a way to look at privacy litigation, and possibly also a way for the legislative community to think about new law.

It has been suggested that the proper issue to focus on is the mere existence of technology rather than its use. However, even though the purveyors of contemporary technology might content themselves with marketing just products rather than services, privacy consequences will inevitably arise as the uses of such products spread. Existence of technology will unavoidably breed some uses that are undesirable in some way. Furthermore, the world, its population, and its institutions must collectively struggle to become more efficient, to conserve resources, to exist and grow, and to establish more equitable societies. Thus, although such products as hand calculators, personal computers, various cable services, wired cities, and on-line data bases can -- in some scenarios -- create privacy consequences in principle, they do not automatically give rise to privacy difficulties in fact and may never, depending on details of the utilization. In many circumstances economic aspects will be the principal driver; although in some, innovative applications by imaginative people can also stimulate problems.

Any discussion of technology will always point out its rapid progress and the profound effect it is likely to have on society, especially when the technology in point is related in some way to information or data. Without question such advances will have a profound effect; the only thing one can argue about is the time scale over which it will occur. Will it be 25, 10, or only 5 years before

things now readily possible in principle will become real? Why though is the certainty of the effect so evident?

First, information -- which is a more comprehensive term than data -- is the essence of purposeful behavior for every element of society. Information is an essential ingredient behind the behavior of organizations, in the functioning of physical mechanisms, and indeed in the basic biological structure of individuals and other life forms. Along with energy, information is the basis for the physical universe as we know it, for everything we appreciate about it, and for the behavior of society and its institutions.

Second, modern communication technology is the transportation mechanism that moves information from place to place and allows us to deliver it wherever wanted. In addition, modern digital computer technology allows us to manipulate information in very general ways, and it is important to note that digital computer technology is the only thing that mankind has which can process information faster than the human head. Thus, together the two technologies allow us to do pretty much anything we wish with information; and to the extent that we do not yet know how to do some things, it is a matter of not yet intellectually understanding enough about the information processes in them. There is no basic lack of technology in the way for the most part.

Thus, the blend of communication and computer technology -- what they jointly make possible -- plus the universality of information as an element of nature, explains why technology is so central as an issue of concern to society at large, especially for privacy consequences, and why the impact of the two is so certain. Furthermore, the same facts

explain why the world has made an irrevocable commitment to computer and communications technology. The days in which affairs could be conducted by paper and pencil under green eyeshades are forever gone; there is no way for the world to retreat from its commitment. Therefore, we as society must deal with the consequences, one of which is privacy in one of its forms.

As the dialogue about informational privacy developed, one sometimes heard the view expressed that "I have nothing to hide; anyone is welcome to know anything about me." The opposite view is that "No one has an intrinsic right to know anything about me except for reason." It is to be observed that society generally does not publish vast encyclopedias concerning all there is to know about everyone; one must therefore conclude that the "let it all hang out" philosophy does not really prevail. On the contrary, society generally controls access to information by many means, although it sometimes grants blanket access to some subset of society; for example, all physicians can access medical records, or the IRS as an organization has all tax information although within IRS access is controlled by job position. One must conclude that a basic axiom of informational or recordkeeping privacy is: "You may not know something about me without a justified (to me), or socially accepted, or legally sanctioned need-to-know."

Looked at that way, one could in principle reduce all of recordkeeping privacy to defining need-to-know for a category of information, plus establishing the authority under which the need-to-know functions. Such an approach is at best a way to deal with privacy when we recognize its presence, but it is not a very broad-gauge one.

The "privacy pie" includes not only fair information policy, which is the way contemporary law approaches recordkeeping privacy, but it also includes aspects of social discrimination, aspects of national vulnerability, plus a broad collection of personal dimensions including physical proximity, surveillance of motion, risk of property, and others.

Philosophically, awkward moral and ethical issues arise when one seeks to define privacy, in part because the very word "privacy" connotes such diverse things to individuals. From a social point of view one might try to frame a broad construct for privacy in terms of equity by using the notions of equality of opportunity for individuals or arbitrary imposition of disadvantage on individuals. It would seem, however, that some very special connotation for "opportunity" or "disadvantage" would be necessary to develop such a theme, and consequently it seems not a satisfactory direction. While it is desirable in the ultimate to have a good definition of privacy to keep its philosophical basis tidy, a more pressing concern is how to identify and define actionable aspects of privacy for the guidance of legislative and judicial affairs.

We -- used as a collective pronoun -- do not really know what privacy is in a comprehensive way, but any individual certainly believes that he knows it when he sees it. What is needed is a framework for recognizing a privacy infraction and deciding what to do about it when it occurs. So let us consider approaching the matter in reverse, so to speak. Rather than trying to define "privacy," define instead "invasion of privacy" and develop an overall construct from that point of view.

Consider the notion of "space" -- not in the context of extraterrestrial void, but rather in the context of personal surround. Intuitively, one knows what is meant by the term because it has been used frequently in contemporary psychological discussions. To illustrate, one's visual space is what is accessible to his eyes; one's aural space, what his ears catch. One's physical space is a cocoon of certain dimensions around a person; and psychological space, while more abstract and harder to define, has something to do with behavioral or perceptual things. Even more abstract is the notion of informational or recordkeeping space, but one's imagination can see a volume that includes all the records that concern one's life.

If one envisions a "space" -- whatever kind it is -- as a physical volume, then one can also envision an intrusion or entry into such a space. If there are negative or undesirable consequences of such an intrusion, they can be cataloged and separated into annoyances, those that constitute harm, and those that should be overlooked or ignored. The total effect of the harmful ones will constitute the definition of what "hurt" or "injury" or "damage" means for the space in question. In turn one can then decide how to legally deal with each space and its intrusions, and further discover where legislative actions or judicial insights are needed.

Try some examples to validate the construct. First consider ones that might be called sensory spaces; the most obvious is visual space. It includes what the eyes see, and the most severe intrusion is probably blindfolding. Others include flashing bright lights, the display of objectionable material, or critical written attacks. Consequences of

such intrusions include sensory deprivation, mental disorientation, especially if the frequency and brightness of a flashing light is just right, annoyance, anger, or damage to reputation. Some of these consequences would be legally actionable under existing law perhaps even as an aggressive act. Under some circumstances intrusion of morally objectionable material before the eyes might be considered an aspect of privacy, whereas written things before the eyes might come under defamation law, but in this particular instance it would be different for a public official and perhaps not actionable.

Another of the sensory spaces would be the aural space which is the totality of what is heard by the ears. Typical intrusions would include loud stereo playing, casual conversation, excessive noise levels such as in a factory, the general background clamor of a city or factory, shouted remarks or obscenities. The consequences of intrusion of aural privacy would range from none through annoyance to physical damage or pain to psychological disturbance or anger. Some of them would be legally actionable as a public nuisance or as noise pollution; others would not be actionable, whereas some would fall under the purview of the Occupational Safety and Health Administration.

Intrusions into one's physical space would include standing close, sitting on the same bench, physical pressure in a crowd, touching and fondling, or the ultimate intrusion of bodily seizure or confinement. The consequences would range from annoyance, to physical discomfort, to psychological malaise, to sexual approach or mortification, or to bodily harm. Some of these would be actionable under the laws of assault, sexual molestation, perhaps public nuisance, unlawful seizure or false

imprisonment. Some of the physical intrusions might be spoken of as privacy invasion under some circumstances, e.g., when another individual sits down on one's parkbench; many will come under other categories. Finally, with respect to recordkeeping space, intrusions would include such things as misuse of information, improper dissemination of information, or collection of inappropriate facts. Consequences would include embarrassment, denial of credit, or destruction of reputation, among others. Generally, the privacy invasion of recordkeeping space is legally actionable under various federal and state laws.

While these examples certainly do not exhaust all possible dimensions of privacy in the general sense, the approach does seem to circumvent the ethical and moral hurdle by implicitly involving both in the process. This approach also seems to properly include the role of case law, but let us develop these last two points more fully.

In the suggested construct, namely of defining invasion of privacy rather than privacy itself, the first step would be to conceptualize or identify a space of concern. The second step is to identify possible intrusions into the space; one should note that such a list could be amended as events occurred or became important to society. The third step would be to identify the consequences of such intrusions; here the moral and ethical views of society can be properly involved. Next one would determine what "hurt" or "damage" or "injury" is for each of the intrusions or consequences; again the moral and ethical views of society clearly would be at work. Also the cumulative effect of case law would establish self-adapting definitions of the three as society changes, or as moral and ethical views evolve. The final step is then the question

of legal actionability; clearly the overall judicial process and legislative attention would be folded in.

The validity of such a "backend-to" procedure is encapsulated in the following series of points:

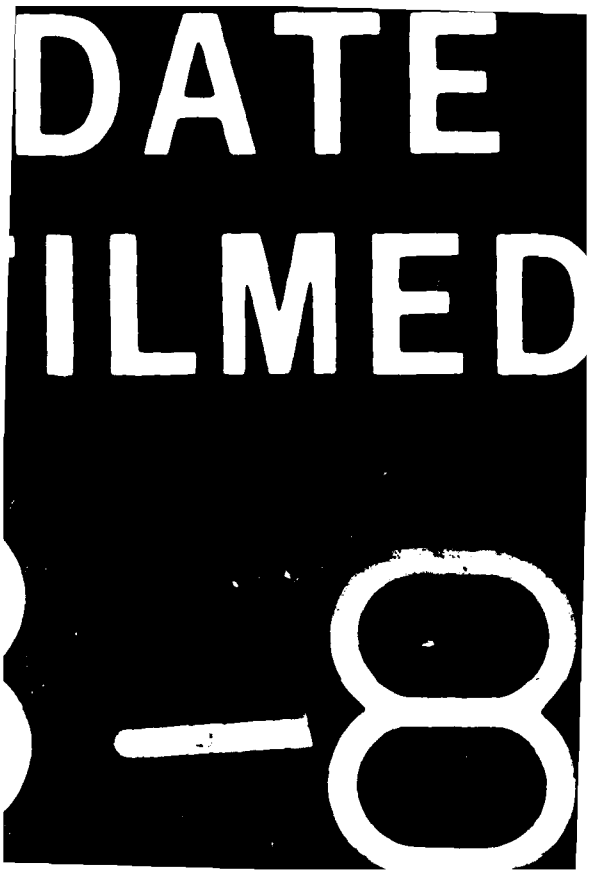
- o Rather than conceive a very broad definition of privacy that can umbrella all the many variations on the privacy theme,
- o It concentrates on events and relates them to societal views, morals, and ethics as exemplified through the legislative and judicial processes.
- o It is a phenomenological approach that concentrates on events rather than causation and thus,
- o It tracks and reflects usage of technology rather than a priori proscribing acceptible boundaries for it.
- o It can accept as part of the overall framework any legal actions that are appropriate to the hurt, e.g., recover damages, penalize the perpetrator, injunct the perpetrator.
- o Furthermore it can accommodate expressions of concern by society in behalf of individuals as well as individuals in behalf of themselves, or even society in behalf of its institutions and organizations.

Finally, the proposed construct -- or taxonomy for privacy -- might be used as an analytic framework for perceiving the privacy consequences of some new use of technology, or for identifying areas where legislative attention is needed. For this purpose one would decide what spaces some new service might intrude, imagine the intrusions and

consequent hurts, and design safeguards or laws to protect against them. For example, a new service such as delivering many forms of information over the cable-TV network might invade visual, aural, recordkeeping, psychological, and perhaps other spaces. In considering the privacy effect of some new technological application, one would have to stitch together the various dimensions of privacy invasion that the technology might impose, and perhaps each of them would have to be dealt with separately under law, judicial action, or social pressure and norms.

Here then is a possible way to consolidate and relate the many dimensions of privacy. It appears sound in terms of the examples given, but on the other hand, all of them have been in the context of an individual. There may need to be a somewhat different set of spaces and intrusions when considering all of society or organizations. There is no pretense that the task of producing a grand construct for privacy is completely finished. The totality of all intrusions into all spaces could be catalyzed under appropriate branches of law or under various specific categoric laws. From a philosophical point of view, one must ask about the various dimensions of hurt or injury. Should it, for example, include denial of right-of-action when such a right is presumed to be one of personal choice? Should it include negative impact, mortification, or shame? Existing privacy law could profitably be examined together with other pertinent law to see whether significant legislative gaps exist and, if so, whether attention is needed. If nothing more, the point of view offered in this paper is at least a different way to think about privacy.

Belatedly, one notes that in the proper context the famous words of Justice Brandeis still prevail: "Privacy . . . the right to be left alone." Now, however, "alone" must be interpreted to mean "alone in a physical sense," or "alone in a visual sense," or "alone in an aural sense," or "alone in a recordkeeping sense," or "alone in . . . ." It would appear that the words which really launched societal concern about privacy are still quite valid if only interpreted to mean: alone in the broadest sense. Even so, however, fuller amplification of Justice Brandeis' words would be necessary. What does "left alone" mean? Freedom, or perhaps protection, from intrusions other than those personally, socially, or legislatively sanctioned? What does "broadest sense" even mean? Perhaps the notion of a space -- which is a concept borrowed from the physical sciences -- together with an easily grasped idea of intrusions into a space, can usefully add scope and fullness to an insightful idea expressed many decades ago.


DATE
ILMED
-8